No. 17-71

In The
Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.

Respondents.

On Writ of Certiorari To
The United States Court Of Appeals
For the Fifth Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF HOME BUILDERS AND AMERICAN FOREST RESOURCE COUNCIL IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, *Amicus* National Association of Home Builders ("NAHB") states that it is a non-profit 501(c)(6) corporation incorporated in the state of Nevada, with its principal place of business in Washington, D.C. NAHB has no corporate parents, subsidiaries or affiliates, and no publicly traded stock. No publicly traded company has a ten percent or greater ownership interest in NAHB.

Amicus American Forest Resource Council ("AFRC") is an Oregon non-profit 501(c)(6) corporation with its principal place of business in Portland, Oregon. AFRC has no corporate parents, subsidiaries or affiliates and does not issue stock. No publicly-held company has a ten percent or greater ownership of AFRC.

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Home Builders ("NAHB") is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and account for 80% of all homes constructed in the United States.

Many of NAHB's members, such as Petitioner, are private landowners with reasonable expectations regarding the lawful use of their property. Since a predominant number of the species protected under the Endangered Species Act ("ESA") have the major share of their habitat on private land, critical habitat decisions significantly impact NAHB's members.

The American Forest Resource Council ("AFRC") is a regional trade association whose purpose is to advocate for sustained-yield timber harvests on public timberlands throughout the West to enhance

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[1] Blanket consents from all parties are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

forest health and resistance to fire, insects, and disease. AFRC promotes active management to attain productive public forests, protect the value and integrity of adjoining private forests, and assure community stability. It works to improve federal and state laws, regulations, policies and decisions regarding access to and management of public forest lands and protection of all forest lands. AFRC represents over 50 forest product businesses and forest landowners throughout California, Idaho, Montana, Oregon, and Washington. Many of AFRC's members have their operations in communities adjacent to federal and state forestlands, and the management of these lands ultimately dictates not only the viability of their businesses, but also the economic health of the communities themselves.

AFRC's members, and the communities in which they work, have been affected by reductions in timber harvest resulting from critical habitat designations, on federal, state, and private land, for species such as the northern spotted owl, marbled murrelet, and Canada lynx. AFRC members' timber contracts have been suspended, slowed or cancelled as a result of overbroad critical habitat designations which fail to comply with the ESA's strict requirements. Overbroad designations also threaten AFRC member interests in forest health, federal timber supply, and private forest land because those designations impede forest management projects that promote forest health and provide timber supply.

AFRC and its members have brought legal challenges to the sufficiency of some of these designations. AFRC believes many of the overbroad critical habitat designations would have been significantly less burdensome if the Government faced accountability for its balancing of economic and other impacts.

SUMMARY OF ARGUMENT

Amici's brief focuses on whether the Fifth Circuit correctly withheld judicial review of the Fish and Wildlife Service's decision not to exclude Unit 1 because of the economic impact of the designation.

The Fifth Circuit's determination that 16 U.S.C. § 1533(b)(2) (Section 4(b)(2)) lacks a "meaningful standard" by which to review the Fish and Wildlife Service's decision triggers a question Under Article I of the Constitution—"Did Congress unconstitutionally delegate authority to the Secretary of the Interior?" Amici argue that the Court may avoid this constitutional question because it is reasonable to harmonize ESA Section 4(b)(2) and APA § 701(a)(2) in a manner that permits judicial review.

ARGUMENT

I. THE FIFTH CIRCUIT IMPROPERLY DENIED REVIEW OF THE SERVICE'S DETERMINATION UNDER ESA SECTION 4(b)(2).

A. The Service Concluded That Designating Unit 1 Had Serious Economic Implications.

According to the United States Fish and Wildlife Service ("Service"):

> St. Tammany Parish is a fast-growing area; according to the Louisiana State Census the population grew from 191,268 to 233,740, or 22 percent, between 2000 and 2010. Growth in the Parish is projected to continue, reaching nearly 500,000 by 2030. The area immediately surrounding the proposed critical habitat is experiencing particularly rapid growth. Within the last few years large warehousing facilities have been constructed or have begun construction in Pearl River. A new high school was recently opened not far from the proposed critical habitat and major transportation infrastructure is planned in anticipation of continued rapid growth in the area. In addition, infrastructure improvements have recently taken place on Highway 1088 between Interstate 12 and Highway 36, which runs through the proposed critical habitat. . . . Because Louisiana Highway 36 runs through the

> proposed critical habitat unit, the area is particularly attractive for development.

IEC, *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog* ¶ 71, 73 (Apr. 6, 2012) ("Final Econ. Analysis"), JA 81-83.

Moreover, the Service appreciated that the designation of Unit 1 could negatively impact this economic development. Under one scenario the Service determined that Clean Water Act ("CWA") Section 404 permits would be necessary before development could occur in Unit 1 -triggering the Endangered Species Act ("ESA") Section 7 consultation process. 16 U.S.C. § 1536. The Service estimated that this would lead to 60 percent of the area being set aside for dusky gopher frog habitat. *Endangered and Threatened Wildlife and Plants: Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog)*, 77 Fed. Reg. 35,118, 35,141 (June 12, 2012). In another scenario, "the Service . . . recommend[s] complete avoidance of development [of Unit 1] in order to avoid adverse modification of critical habitat." Final Econ. Analysis ¶76, JA 85. Under these scenarios, the lost residential and commercial development opportunities would be $20.5 million or $34.0 million respectively. 77 Fed. Reg. at 35,140-141.

On the other side of the equation, the Service determined that no monetary benefits from the designation could be quantified, but found benefits "expressed in biological terms." *Id.* at 35,141. Yet, when it balanced the $20.5 or $34 million loss to the

landowners against the unquantified biological benefits, the Service "did not identify any disproportionate costs" of designation. *Id.*

B. The Fifth Circuit Failed to Provide Judicial Review.

The Fifth Circuit refused to review whether the Service abused its discretion by failing to exclude Unit 1 from the final designation of gopher frog critical habitat. The decision to preclude review involves an interpretation of the relationship between two statutes, 16 U.S.C. § 1533(b)(2) and 5 U.S.C. § 701(a)(2) (ESA Section 4(b)(2) and the Administrative Procedure Act ("APA")).

ESA Section 4(b)(2) provides that the Service "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). Furthermore, the Service:

> may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [it] determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

Id.

Section 701 of the APA provides that agency actions "committed to agency discretion by law" are not reviewable in federal court. 5 U.S.C. § 701(a)(2).

Relying on *Heckler v. Chaney*, 470 U.S. 821, 830 (1985), [2] the Fifth Circuit held that the words "may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat . . ." results in a decision unreviewable under APA § 701(a)(2) because these words fail to provide a "meaningful standard" to review the Service's determination.[3] *See Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 473 (5th Cir. 2016). The court, however, failed to fully consider the implications of its holding which includes serious questions as to the constitutionality of Section 4(b)(2).

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[2] In *Chaney*, the Court explained that agency action is committed to agency discretion when there is "no meaningful standard against which to judge the agency's exercise of discretion." *Chaney*, 470 U.S. at 830.

[3] The Court below was comfortable with this interpretation because one other circuit and a number of district courts had also ruled that a decision not to exclude an area from critical habitat was unreviewable. *Markle*, 827 F.3d at 473-74.

II. THE FIFTH CIRCUIT FAILED TO ADDRESS THE NONDELEGATION DOCTRINE.

A. The Nondelegation Doctrine Requires Congress to Provide Standards to Guide Agency Actions.

Article I of the Constitution vests all legislative powers in the Congress of the United States. "That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892); *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 673 (1980) (Powell, J., concurring). This is known as the nondelegation doctrine. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (explaining that Article I permits no delegation of Congress's legislative powers).

However, "[i]f Congress shall lay down by legislative act an *intelligible-principle* to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (emphasis added). "The intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes." *Loving v.*

United States, 517 U.S. 748, 771 (1996). This Court has explained that Congress has failed to state an intelligible-principle if "there is an *absence of standards* for the guidance of [an agency's] action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed . . ." *Yakus v. United States*, 321 U.S. 414, 426 (1944) (emphasis added); *Indus. Union Dep't*, 448 U.S. at 686 (1980) (Rehnquist, C.J., concurring) (explaining that the intelligible-principle rule requires "ascertainable standards" by which a court can test the exercise of delegated legislative discretion).

B. The APA § 701(a)(2) Test And The Intelligible-Principle Rule Are Similar.

As shown above, the test used to determine if APA § 701(a)(2) precludes judicial review requires a court to determine if Congress has provided a "meaningful standard" by which to measure an agency's discretion. If Congress failed to provide a meaningful standard, then judicial review is precluded. Similarly, if there is an "absence of standards" to guide an agency's actions, then Congress may have failed to provide an "intelligible-principle"; thereby unconstitutionally delegating authority to an agency.

Consequently, because of the similarities between these tests, once a court determines that a statute does not provide a meaningful standard (precluding

review under the APA), it should be on guard for questions as to the constitutionality of said statute.[4]

In the case at hand, by holding that Section 4(b)(2) lacks a meaningful standard, the Fifth Circuit triggered a question that it should have answered, or at the very least acknowledged—"Did Congress unconstitutionally delegate authority to the Secretary of the Interior pursuant to Section 4(b)(2)?"

III. ESA SECTION 4(b)(2) AND APA § 701(a)(2) SHOULD BE HARMONIZED TO AVOID THE NONDELEGATION DOCTRINE.

By relying on the canon of constitutional avoidance, this Court can elude the conundrum presented by § 701(a)(2) and the nondelegation doctrine.

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[4] Commentators have recognized, there is a clear tension between APA § 701(a)(2)'s "meaningful standard" test and the "absence of standard" test the Court has articulated to determine whether Congress has provided an intelligible-principle. Viktoria Lovei, *Revealing the True Definition of APA § 701(a)(2) by Reconciling "No Law to Apply" with the Nondelegation Doctrine*, 73 U. CHI. L. REV. 1047, 1060 (2006) ("[i]f a statute is so broad that it lacks a guiding policy, the statute may lack an intelligible-principle, in violation of the nondelegation doctrine."); *see* Amee B. Bergin, *Does Application of the APA's "Committed to Agency Discretion" Exception Violate the Nondelegation Doctrine?* 28 B.C. ENVTL. AFF. L. REV. 363, 396 (2001) (arguing that "[i]f a court finds that a delegation lacks 'law to apply,' it follows analytically that not only *can* the court find that the delegation lacks an intelligible-principle, but that it *must* do so.").

A. The Canon of Constitutional Avoidance.

As the Court recently stated, "[w]hen 'a serious doubt' is raised about the constitutionality of an act of Congress, 'it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (explaining that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, [it] will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

Here, interpreting Section 4(b)(2) and § 701(a)(2) to preclude judicial review raises a serious Article I issue. However, as illustrated in the sections below, it is "fairly possible" to construe these statutes in a manner that allows judicial review.

B. The APA Encourages Judicial Review.

The cardinal rule governing the relationship between courts and administrative agencies is that agency action is presumptively subject to judicial review. *Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645 (2015) (stating "this Court applies a 'strong presumption' favoring judicial review of administrative action"); *Sackett v. E.P.A.*, 566 U.S. 120, 128 (2012) (recognizing the APA "creates a

presumption favoring judicial review of administrative action"); *Califano v. Sanders*, 430 U.S. 99, 104 (1977) (discussing "Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials"). Together, the avoidance canon and the presumption of reviewability push strongly toward enabling judicial review of decisions not to exclude critical habitat. The panel majority ignored the reviewability presumption and, in doing so, "falter[ed] at the starting line." *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Service*, 848 F.3d 635, 653 (5th Cir. 2017) *reh'g en banc den.*

Off the block the Fifth Circuit read Section 4(b)(2) to insulate the Service's negative exclusion determination from judicial review. It never applied, let alone recognized, the APA presumption favoring judicial review or this Court's interpretation of that presumption. The six-judge dissent from the denial of rehearing en banc found the panel's approach "plays havoc" with the well-established presumption favoring judicial review and constitutes an "abdication of our responsibility to oversee, . . . agency action" for abuse of discretion. *Id.* at 652, 654-655 (Jones, J., dissenting).

Congress passed the APA in 1946 in direct response to concerns over unbridled administrative agency power. In hearings on the APA, Congressman Francis Walter, Chairman of the House Judiciary Committee, in discussing the § 701(a)(2) exception for matters committed to agency discretion by law, remarked that agencies "do not have authority in

any case to act blindly or arbitrarily." H.R. 615, 79th CONG. §10 (1946), *reprinted in* Administrative Procedure Act: Legislative History, 92 CONG. REC. 5750 (daily ed. May 24, 1946)(Westlaw). Senator McCarran, Chairman of the Senate Committee on the Judiciary, further emphasized the "indispensable" value of judicial review "since its mere existence generally precludes arbitrary exercise of powers." 92 CONG. REC. 2159 (1946), *reprinted in* Administrative Procedure Act: Legislative History, H. REP. NO. 79-1980, at 2201 (2d Sess. May 3, 1946). In addition, the House Judiciary Committee noted that all agency decisions are presumptively reviewable absent clear congressional intent to withhold that right:

> Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.

S. REP. NO. 79-752, at 26 (1st Sess. Nov. 19, 1945).

Congress enacted the APA to capture a wide range of agency activities. "The legislative material elucidating [the APA] manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the [APA's] 'generous

review provisions' must be given a 'hospitable' interpretation." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967) (internal citations and footnotes omitted)(*abrogated on other grounds* by *Califano v. Sanders*, 430 U.S. 99 (1977)). Further, "the Court [has] held that only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." *Abbott*, 387 U.S. at 141 (internal quotation omitted); *see also Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986) (providing that "the rule is that the cause of action for review of such action is available absent some clear and convincing evidence of legislative intention to preclude judicial review.") "A restrictive interpretation of [APA § 704] would unquestionably, in the words of Justice Black, 'run counter to § 10 and § 12 of the [APA]. Their purpose was to remove obstacles to judicial review of agency action under subsequently enacted statutes . . . .'" *Bowen v. Massachusetts*, 487 U.S. 879, 904 (1988) (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955)).

In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), the Court advanced its first interpretation of the APA's "committed to agency discretion" exception to judicial review. Drawing on the legislative history of the APA the Court explained that § 701(a)(2) is a "very narrow exception . . . applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is *no law to apply*'." *Id.* at 410

(emphasis added)(quoting S. REP. NO. 79-752, at 26 (1945)).[5]

The presumption of reviewability embodied in the APA and its relationship to the § 701(a)(2) exception was further clarified in *Chaney*. In *Chaney*, the Court determined that agency decisions not to pursue enforcement actions are presumptively *unreviewable* absent "law to apply" in the form of substantive guidelines restricting the agency's enforcement discretion. "[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'"[6] *Id.* at 830.

Chaney, however, is limited to cases involving agency refusal to initiate enforcement proceedings. The Court left intact the presumption favoring judicial review in cases involving agency discretion not to initiate rulemaking and other

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[5] Similar to the case at hand, the statute in *Overton Park* required the Secretary of Transportation to conduct a balancing of competing interests. *Overton Park*, 401 U.S. at 413.

[6] The primary source of a "meaningful standard" for judicial review is typically the language of the statute at issue. However, *Chaney* did not say that a statute is the only source. The Court only said that a reviewing court must 'have' such a standard. Kenneth Culp Davis, *No Law to Apply*, 25 San Diego L. Rev. 1, 4 (1988). In *Chaney*, the court reviewed the governing statute for standards or guidelines in addition to the agency's own policy statements and regulations before concluding that Congress provided no meaningful standards to guide its review. *Chaney*, 470 U.S. at 836, 839, 853.

nonenforcement decisions. *See Chaney*, 470 U.S. at 825 n.2, 833 n.4.

Hence, in contrast to the Fifth Circuit's interpretation of § 701(a)(2), the APA's legislative history and Supreme Court precedent support a narrow reading of § 701(a)(2).

C. The Fifth Circuit Misread Section 4(b)(2) and § 701(a)(2).

The Fifth Circuit found that Section 4(b)(2) "establishes a discretionary process by which the Service *may* exclude areas from designation, but it does not articulate any standard governing when the Service *must* exclude an area from designation." *Markle*, 827 F.3d at 474. This conclusion has a textual and a structural problem.

Textually, the APA does not require a claimant to establish a mandatory duty unless a decision compelling action unlawfully withheld is sought pursuant to 5 U.S.C. § 706(1). *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63-64 (2004).

Structurally, the Fifth Circuit erroneously concluded that the presence of some discretion to exercise meant that the entire action was committed to agency discretion by law. Courts that find an action is committed to agency discretion invoke a fully optional process, such as prosecutorial discretion, *Chaney*, 470 U.S. at 831-32, or environmental review, *Burbank Anti-Noise Grp. v. Goldschmidt*, 623 F.2d 115, 116 (9th Cir. 1980)

(holding that adequacy of an Environmental Impact Statement was not reviewable where no statement was required). Section 4(b)(2) provides a specific threshold for the exercise of discretion "if [the Service] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habit." It also provides a limit to the discretion: "unless [the Service] determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." *Id.* This gives ample guidance to determine whether the Service relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

The policy concerns that underlay other cases on discretion do not apply here. In the usual situation, "when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect. ..." *Chaney*, 470 U.S. at 832. But here, the converse applies: the agency's decision not to exclude critical habitat results in the exercise of coercive power over those who would use the subject property. *Infra* pp. 21-26. And the decision not to exclude is part of a larger regulation which is an appropriate subject of review.

On its face, moreover, the Service's finding here does not comply with the mandate of ESA Section 4(b)(2). Section 4(b)(2) requires the Service to take into account the economic impact, and any other relevant impact, before designating critical habitat. Exclusion may occur if the benefits of an exclusion outweigh the benefits of designation. 16 U.S.C. 1533(b)(2). Simply disregarding economic impacts as not "disproportionate" to the designation does not weigh the economic and other impacts against the (slight) benefits of designation. Instead, it implies that no matter the size of the economic impacts, they are acceptable if not out of line with the scope of economic impacts from other critical habitat designations. The ESA does not allow the Service to shift its own goalposts like this. Instead, it requires an individualized inquiry to ensure the economic and other impacts of the specific designation are taken into account.

D. The Fifth Circuit's Opinion is Internally Inconsistent.

Leading up to the designation of gopher frog critical habitat, the Service prepared a draft and a final economic analysis. Between the draft and final the Service had two rounds of comments. 77 Fed. Reg. at 35,140. The final economic analysis quantified the impacts of the designation on the following activities: active species management, residential and commercial development, timber management and military activities. *Id.* For these activities, the Service quantified the costs for 20 years under three different scenarios. *Id.* But it did not monetize or

quantify any economic benefits. And in the end, the Service concluded that there were not "any disproportionate costs that are likely to result from the designation" of Unit 1. *Id.* at 35,141.

According to the Fifth Circuit, Section 4(b)(2) does not provide a "meaningful standard" by which to review the Service's conclusion. However, the court also held that "[s]ection 1533(b)(2) articulates a standard for reviewing the Service's decision *to exclude* an area." *Markle*, 827 F.3d at 474 (emphasis added). Thus, if the Service had conducted the exact same analysis as summarized above, but in the end excluded Unit 1 because the costs were disproportionate, the court would review that decision.[7]

In other words, it is the action taken by the Service in response to Section 4(b)(2) that determines whether 4(b)(2) provides a "meaningful standard." If the Service excludes an area, then the words in Section 4(b)(2) provide a meaningful standard. However, if it decides not to exclude that same area, then those same words provide no meaningful standard. This is inconsistent with the lower court's statement that the *words of the statute* (not the ultimate decision) fail to provide a meaningful standard. *Id.* (providing that the "statute is silent

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[7] The Court of Appeals for the Ninth Circuit has also failed to recognize the inconsistency and held the decision to exclude an area is reviewable. *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 989 (9th Cir. 2015); *Bldg. Indus. Ass'n of the Bay Area v. U.S. Dep't of Commerce*, 792 F.3d 1027, 1034 (9th Cir. 2015).

on a standard for reviewing the Service's decision to *not* exclude an area.")

The Court can avoid the internal inconsistency produced by the Fifth Circuit's reasoning by holding that judicial review is available whether the Service decides to exclude an area or not to exclude an area from designation.

E. Agency Action that Constrains The Use of Private Property Must be Subject to Judicial Review.

The Fifth Circuit's opinion begins with a discussion of the "misconceptions" about the impacts of critical habitat designations on private property. The court explains that a designation does not convert private property into a public park or wildlife refuge, open the door to species reintroductions or mandate land management practices in favor of listed species. *Markle*, 827 F.3d 452 at 458. While a designation itself may not immediately restrict particular land uses, it does place the Service in a superior position to extort unjustified concessions from landowners seeking a federal permit or other federal approval. It is this coercive power that accompanies a designation, or decision not to exclude under Section 4(b)(2), that warrants judicial review. 16 U.S.C. § 1533(b)(2). Otherwise, property owners are left with "little practical alternative but to dance to the [Service's] tune." *Sackett*, 566 U.S. at 132 (2012).

In a unanimous decision, this Court in *Sackett* overturned decades of uniform case law prohibiting judicial review of EPA and United States Army

Corps of Engineers ("Corps") compliance orders. After filling in a portion of their property in preparation for the construction of a family home, the Sacketts received an EPA compliance order. The order directed them to immediately "restore" their property and give EPA access to their property and records. *Id.* at 125. The Sacketts had good reason to doubt the presence of "jurisdictional wetlands," but no means to mount a challenge. Like so many courts before it, the Ninth Circuit had found that the CWA precluded the review of compliance orders. *Sackett v. E.P.A.*, 622 F.3d 1139, 1147 (9th Cir. 2010).

The Sacketts faced a dilemma. Ignore the order and wait to be sued to get their day in court, all the while racking up to $75,000 in daily penalties, or halt construction and engage in expensive restoration work to comply with an order they believed to be invalid. The EPA suggested this was a tolerable choice because compliance orders simply "provid[e] a means of notifying recipients of potential violations and quickly resolving the issues through *voluntary compliance*" as opposed to serving as a "coercive sanction that itself must be subject to judicial review." *Sackett*, 566 U.S. at 128-129 (emphasis added).

This Court held that the APA entitled the Sacketts to immediately challenge EPA's compliance order. In doing so, the Court dismantled several arguments advanced by the EPA regarding why the statutory scheme of the CWA impliedly precludes review. It found that nothing in the CWA's statutory scheme was enough to overcome the APA's strong

presumption of reviewability. *Id.* at 128. Nor was this Court moved by EPA's claim that agency efficiency would be undercut if orders were subject to judicial review, stating "[t]he APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all." *Id.* at 130. The opinion concluded with a warning to overzealous EPA officials: "[T]here is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review . . . " *Id.* at 130-131.

Four years following *Sackett* this Court continued its trend of judicial skepticism of agency actions having immediate practical consequences on landowner rights with no reasonable opportunity for review. With a unanimous vote, the Court held that a Corps' "jurisdictional determination" ("JD") is final agency action open to immediate challenge under the APA § 704. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S.Ct. 1807 (2016).

Hawkes Co., a peat mining firm, applied for a Corps permit to "fill" a portion of its 530-acre property. Corps officials urged Hawkes to abandon the permitting process, citing extended delays, high costs and an uncertain outcome. When Hawkes refused to back off the permitting process which, if successful, could extend its peat mining operations up to 15 years, Corps officials again discouraged Hawkes from moving forward. Agency officials told a Hawkes employee to "start looking for another job," buried the landowner with paperwork demands

costing upwards of $100,000 and urged the sale of the property to a "wetlands bank." *Hawkes Co., Inc. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 998 (8th Cir. 2015).

Following a two-year delay, the Corps issued an approved JD concluding that Hawkes' property contained "waters of the United States" based on a "significant nexus" between wetlands and the Red River of the North located some 120 miles away. *Id.* Not unlike the landowners in *Sackett*, Hawkes disagreed with the agency's decision and faced an unreasonable choice: (1) abandon its peat-mining operations; (2) apply for and obtain a permit at immense cost, long delay and likely agency-imposed limitations on the full use of the property; or (3) ignore the JD and proceed with mining operations at the risk of significant civil fines and potential criminal penalties. *Id.* at 997.

Hawkes filed suit seeking judicial review of the JD under the APA. In allowing judicial review, the Eighth Circuit remarked on the "coercive effect" of an agency-issued JD which "adversely affects appellants' right to use their property in conducting a lawful business activity." *Hawkes*, 782 F.3d at 1000-1001. It further explained:

> The prohibitive costs, risk, and delay of these alternatives to immediate judicial review evidence a transparently obvious litigation strategy: by leaving appellants with no immediate judicial review and no adequate alternative remedy, the Corps

> will achieve the result its local officers desire, abandonment of the peat mining project, without having to test . . . its expansive assertion of jurisdiction . . . .

Id. at 1001-1002.

This Court unanimously affirmed the Eighth Circuit's ruling that Hawkes was entitled to judicial review under the APA. The Court reasoned that a "negative" determination regarding the presence of jurisdictional waters creates a five-year "safe harbor" shielding property owner from federal prosecution. Conversely, a positive determination triggers legal consequences through the deprivation of that safe harbor. *Hawkes*, 136 S.Ct. at 1814. Furthermore, it emphasized the APA's presumption of reviewability for all final agency actions. *Id.* at 1816 (citing *Sackett*, 566 U.S. at ----).

The concerns the Court had in *Sackett* and *Hawkes* apply equally here. In both prior cases, the Court recognized the agencies' coercive power is amplified absent judicial review. Here, the Service's refusal to exclude Unit 1 on the basis of economic impact solidifies federal control over the property owners' future development activities to the extent those activities require a federal permit or approval. The economic impacts of the federal control are enormous[8] and this gives the Service "extraordinary leverage" over the owners of Unit 1. Tr. of Oral

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[8] Supra pp. 6.

Argument at 48, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S.Ct. 1807 (2016) (No. 15-290).[9]

Furthermore, in *Hawkes* the Court recognized that a negative JD gave the property owner a "safe harbor" and therefore, a positive JD had negative consequences.[10] The same is true here. If the Service had excluded Unit 1 from the designation, then ESA Section 7 would not have any impacts on the landowners' future plans (i.e. a safe harbor from Section 7). Thus, following the reasoning in *Hawkes*, a decision not to exclude Unit 1 denies the landowner the benefits of that safe harbor. And according to the Fifth Circuit, the Service may deny that safe harbor free from the oversight of judicial review.

This Court should continue its recent practice to closely examine the possibility that, when shielded from judicial review, government agencies may use their superior strength to demand unjustified concessions from landowners through constraints on the use of private property. In *Sackett* and *Hawkes* this Court unanimously rejected such abuse by the EPA and Corps. It should apply the same check on the Service here.

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[9] The Service recognized that designation of Unit 1 would interfere with planned development, but "hope[s] to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property" while extending protections for the non-existent gopher frog and its non-habitat. 77 Fed. Reg. at 35,123. The Service's suggestion is disingenuous, as the landowner has little practical alternative but to "work with" the Service.

[10] Supra p. 25.

F. Judicial Review of Section 4(b)(2) Is Essential to Provide Accountability for Designations Much Larger and More Consequential than Unit 1.

Unit 1's designation has imposed negative consequences on the owners of the parcel and the community of St. Tammany Parish. Yet such consequences pale in comparison to landscape-scale impacts from critical habitat designations similarly shielded from judicial review.

One such designation is critical habitat for the northern spotted owl. Across Oregon, Washington, and California, the Service designated 8.5 million acres of critical habitat for the owl in 2012. U.S. Fish & Wildlife Service, *Endangered and Threatened Wildlife and Plants; Designation of Revised Critical Habitat for the Northern Spotted Owl* (Strix caurina occidentalis), 77 Fed. Reg. 71,876 (Dec. 4, 2012). Of the lands designated as critical habitat, more than 2.6 million acres are "matrix lands," which were set aside under the Northwest Forest Plan ("NWFP") to provide a steady supply of federal timber to the local forest products-based economy. 77 Fed. Reg. at 71,876; *id.* at 71,880 (noting that "matrix areas [are] where timber harvest would be the goal."). The Service concluded that "economic impacts to [Forest Service] timber harvest are relatively more likely in unoccupied matrix lands or approximately 1,158,314 acres of 2,629,031 total acres of all [Forest Service] matrix lands." 77 Fed. Reg. at 72,028. The resulting decrease in timber supply is substantial. *Id.*

To place this in context, the Service's 2012 rule designated over 65% of the "matrix" lands as owl critical habitat. U.S. Forest Service and U.S. Bureau of Land Management, *Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl*, April 13, 1994 ("NWFP ROD") at 7.[11] This despite the fact that the NWFP already set aside about 20 million acres in the form of Late Successional and Riparian Reserves and other land allocations. *See* NWFP Standards and Guidelines, at A-5. Such reserves already included areas that "will maintain a functional, interactive, late-successional and old-forest growth ecosystem." NWFP ROD at 6.

In attempting to resolve disputes relating to forest management, the NWFP promised, in President Clinton's words, to "produce a predictable and sustainable level of timber sales . . ." NWFP ROD at 3. The Forest Service concedes the NWFP was expected to "provide predictable levels of resource outputs and recreation opportunities, which would in turn provide predictable levels of employment. *This was not achieved with respect to timber supply.*" U.S. Forest Service, *Social and Economic Status and Trends, Northwest Forest Plan: The First 20 Years, Report*, Report No FS/R6/PNW/2015/0006, Feb. 2016, at 57 (emphasis added). Not surprisingly, the failure to offer stable timber supply coincided with

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[11] Documents relating to the NWFP are available electronically at the website of the Regional Ecosystem Office, *https://www.fs.fed.us/r6/reo/nwfp/documents/* (*last visited* April 25, 2018).

substantial downturns in rural population and vibrancy. *See id.* at 39 (showing metropolitan population increase by 8 percent since 1994 and nonmetropolitan decrease by 10 percent). President Clinton's promise to rural communities was not met.

In revising the critical habitat for the spotted owl, the Service disregarded the economic dislocation that had already occurred and waved away concerns about continued disruption.

The Service concluded "only a portion of the overall proposed revised designation will result in more than incremental, minor administrative costs." 77 Fed Reg. at 71,946. It further discounted economic effects by claiming there could be positive or negative effects. *Id.* at 71,947. But the Service did not exclude a single acre based on economic effects, instead exercising its Section 4(b)(2) discretion only to exclude areas under conservation agreements, programs and partnerships. *Id.* at 71,890. The Service concluded its analysis with the following remarkable assertion:

> While there is uncertainty over whether such [economic] impacts will occur and to what extent, even assuming higher economic impacts suggested by some commenters, we would not exclude these lands from designation under section 4(b)(2) because a critical habitat designation on these [matrix] lands will have benefits in conserving this essential habitat.

77 Fed. Reg. at 71,947. By a logical reading of Section 3(5)(A), all critical habitat must have some sort of conservation benefit. 16 U.S.C. § 1532(5)(A). But under the Services' approach, federal lands with any conservation benefit whatsoever would not be excludable. Thus, the non-reviewability of exclusion decisions allows the agency to rewrite the governing statute.

Meaningful economic analysis is feasible. For example, the first spotted owl critical habitat rule, issued in 1992, recognized "the overall effects on the Northwest timber industry and to some counties in particular, were potentially severe . . . " U.S. Fish & Wildlife Serv., *Endangered and Threatened Wildlife and Plants; Determination of Critical Habitat for the Northern Spotted Owl*, 57 Fed. Reg. 1796, 1807 (Jan. 15, 1992). As a result, the first designation excluded some federal lands to mitigate the worst job losses. *Id.* at 1807-08.

The Service also made use of its powers to coerce changes to governing land use plans. The final rule explained that it "does not change land use allocations or Standards and Guidelines for management under the NWFP." 77 Fed. Reg. at 71,880. In the same breath, however, the Service asserted conservation outside NWFP reserves "is increasingly important for species recovery." *Id.* at 71,881. In essence, the Service arrogated to itself the authority to rewrite the governing Forest Plan without the public process that normally accompanies such initiatives. *See* 16 U.S.C. § 1604;

Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 729-30 (1998).

Even where its critical habitat designation is subject to challenge on the merits, the Service has denied the existence of economic impacts in disputing the standing of affected stakeholders. Although the Service initially obtained a dismissal of a challenge to the spotted owl critical habitat rule, *Carpenters Indus. Council v. Jewell*, 139 F. Supp. 3d 7 (D.D.C. 2015), the D.C. Circuit reversed. The Circuit Court held "the Service's designation will likely cause a decrease in the supply of timber from designated forest lands." *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 (D.C. Cir. 2017). The court further held the Services' "argument to the contrary belies the text, purpose, and operation of the Final Rule designating the critical habitat in this case. Not to mention, it defies basic common sense." *Id.*

On a number of occasions, the Service has unduly discounted, or denied altogether, the negative impacts of its critical habitat designations. This refusal to acknowledge economic impacts has been insulated from judicial review by decisions like the one below. Providing for judicial review will ensure that the heavy hammer of critical habitat designation does not swing blindly.

CONCLUSION

The Fifth Circuit's decision to withhold judicial review raises serious constitutional issues under the nondelegation doctrine. There are, however, ample

reasons to harmonize APA § 701(a)(2) and ESA Section 4(b)(2) to allow for judicial review. Thus, the Court should avoid the constitutional question, and reverse the lower court's decision.

Dated: April 30, 2018

/s/ Thomas J. Ward

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